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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]

IOWA PUBLIC SERVICE COMPANY, *Petitioner,*

v.

IOWA STATE COMMERCE COMMISSION: DICK A. WITT, FRANK B. MEANS and BERNARD J. MARTIN, Chairman and Commissioners of the Iowa State Commerce Commission; ARNOLD E. ALDRICH, G. J. CHENEY, FLOYD E. DOMINY, STEWART L. UDALL; and the U. S. BUREAU OF RECLAMATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief in Opposition for Respondents, Iowa State Commerce Commission: Dick A. Witt, Frank B. Means and Bernard J. Martin, Chairman and Commissioners of the Iowa State Commerce Commission

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. pp. A-4-A-11) is reported at 407 F. 2d 916.

The opinions of the United States District Court for the Southern District of Iowa are not reported or

printed in the Petition for Writ of Certiorari. They are contained in the Record at pages R-31 and R-34.

The order of the Iowa State Commerce Commission is not reported or printed in the Petition for Writ of Certiorari. It is printed in the Record at page 6.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 5, 1969 (Pet. App. p. A-12). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the dismissal of a complaint without hearing by a state regulatory agency constitutes a denial of due process when the agency has neither jurisdiction of the respondents to the complaint nor of the subject matter of the complaint.

2. Whether the activities of the United States Bureau of Reclamation and its officials in offering to furnish hydro-electric power are subject to control and regulation by a state regulatory agency.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C. Section 1442 and Sections 490A1, 490A.13, 490A.17 and 490A.24 of the 1966 Code of Iowa, which Petitioner considers involved are set forth in the Appendix to the Petition for Writ of Certiorari (pp. A-1-A-4).

The relevant portions of Article VI of the United States Constitution and 43 U.S.C. 485h(c). Section

9(c) of the Flood Control Act of 1944, 58 Stat. 887, 891, Section 490A.3, Code of Iowa, 1966, which these Respondents consider involved are set forth in Appendix A hereto (pp. 1, 2).

STATEMENT

1. Proceedings Before the Iowa State Commerce Commission

In October, 1966, Petitioner filed a complaint with the Iowa State Commerce Commission against the U. S. Government-Respondents, alleging, inter alia, that the U. S. Government-Respondents were public utilities as defined by Chapter 490A, Code of Iowa, 1966, subject to the regulatory jurisdiction of the Commission (R. pp. 1-2, 4); that the U. S. Government-Respondents had offered to supply, wholesale, electrical energy to meet the requirements of four Iowa incorporated communities which own and operate their own utility plants and provide electric service to ultimate consumers located in the communities (R. pp. 2, 5); and that the U. S. Government-Respondents offer to sell electric energy in wholesale quantities to the four communities for resale to ultimate consumers was in violation of Section 490A.24, Code of Iowa, 1966, (R. pp. 2, 4).

Petitioner requested that the Commission find that the U. S. Government-Respondents in offering to sell electrical energy to the four communities were in violation of the provisions of Section 490A.24, Code of Iowa, 1966, and that the Commission order the U. S. Government-Respondents to "cease and desist" such violation (R. pp. 5-6).

By letter dated December 5, 1966, (Sup. pp. 1-4) the United States Department of the Interior responded to the complaint contending that the U. S.

Government-Respondents and their activities complained of were non-jurisdictional to the Commission. By letter dated December 16, 1966, Petitioner replied (Sup. R. pp. 4-6).

By order dated February 6, 1967, the Commission dismissed the complaint. The Commission found that the U. S. Government-Respondents were not a public utility as defined by Iowa statute; that the activities complained of were authorized by Federal Constitution and statutes and outside its regulatory jurisdiction; that in any event the activities complained of were not prohibited by Iowa statutes; that there were no reasonable grounds for investigating the complaint (R. pp. 6-7).

2. Proceedings Before the United States District Court

In March, 1967, the Petitioner filed a notice of appeal and a petition in the District Court for Polk County, Iowa, seeking review of the Commission's order dismissing the complaint. Named as defendants were the Commission and its individual members and the U. S. Government-Respondents. The Petitioner contended that the Commission's actions with respect to the complaint were arbitrary and capricious and an abuse of discretion because no hearing was held; that the Commission Order was not in accordance with law and contrary to constitutional rights in violation of the Fourteenth Amendment to the United States Constitution and provisions of the Iowa Constitution; and that the Order was in excess of statutory authority. The Petitioner requested that the Commission Order be vacated and the matter remanded to the Commission for further proceedings (R. pp. 7-10). The Commission answered (R. p. 11).

On petition by the U. S. Government-Respondents, the proceeding was removed to the United States District Court for the Southern District of Iowa under 28 U.S.C. 1442(a)(1) (R. pp. 12-14). Upon removal to the United States District Court the U. S. Government-Respondents moved to dismiss the petition on the grounds that the U. S. Government-Respondents were not a public utility as defined by Section 490A.1, Code of Iowa, 1966; that even if the U. S. Government-Respondents were a utility, as defined, their activity complained of is permitted by the express terms of Section 490A.24, Code of Iowa, 1966; and that in any event the action had not been consented to by the United States, which therefore had not waived its sovereign immunity to suit (R. pp. 14-21).

The Petitioner's motion to remand the cause to State Court (R. pp. 21-23) was denied (R. pp. 31-33).

The United States District Court found, after hearing, "that there are not adjudicative facts in the complaint to precipitate trial and the Court firmly believes that there was sufficient matter submitted to the Commerce Commission by the complainant to permit the ruling made" (R. p. 38).

"The conduct, action and processing of this matter, and the findings of the Commission and its Order" (R. p. 38) were affirmed by the District Court and it granted the motion of the U. S. Government-Respondents to dismiss (R. p. 39). Judgment thereon was entered February 2, 1968 (R. p. 40).

3. The Court of Appeals' Affirmance of the District Court and Commission Orders

Petitioner filed a timely Notice of Appeal from the Judgment of the District Court of February 2, 1968, with the United States Court of Appeals for the Eighth Circuit (R. p. 40).

The Court of Appeals on March 5, 1969, in a unanimous opinion, affirmed the District Court's dismissal of the suit for at least two reasons:

> "1. The activities of the federal officials and the United States Bureau of Reclamation, which is merely an organizational division of the Department of the Interior, in offering to furnish hydroelectric power by virtue of congressional authority expressed in 43 U.S.C. 485 h(c) and § 9(c) of the Flood Control Act of 1944, 58 Stat. 887, 891, are protected by the Supremacy Clause of the United States Constitution, Article VI, from interference by state regulation or control.
>
> 2. This is an uncontested (Sic) suit against the federal government, a sovereign power" (footnotes omitted) (Pet. p. A-7). The Court of Appeals also observed that it was "of the opinion that the findings, both factual and legal, of the Iowa Commission are entirely proper and that the procedure utilized was warranted under Iowa law and does not contravene federal constitutional requirements". (Pet. p. A-7).

The Court of Appeals noted that Petitioner did not "challenge the constitutional authority of Congress to pass the Flood Control Act of 1944 with its provisions for the disposal of electrical energy. (citing case). The United States Government in selling this electrical energy is free to do so without direction or control by state law or regulation". (Pet. p. A-9).

The Court of Appeals also noted that Petitioner's contention "that it is not seeking to restrain the federal government but only federal officials is wholly lacking in substance. There is no claim that the federal defendants are acting beyond or in excess of their statutory authority", (Pet. p. A-10) and that "this is clearly a suit against the United States". (Pet. p. A-11).

The Court of Appeals accordingly entered its judgment on March 5, 1969, affirming the District Court (Pet. p. A-12).

ARGUMENT

1. Assuming *arguendo* that the United States has consented to the maintenance of the action and that the Supremacy Clause of the United States Constitution, Article VI, does not prohibit the State of Iowa from regulating the sales of power in question, as the District Court noted (R. p. 37):

> "It must be perfectly obvious that if the U. S. Bureau of Reclamation and its officers are not a public utility under the provisions of Chapter 490A of the 1966 Code, then and in that event the petition must fail."

The Commission-Respondents finding that as a matter of law the U. S. Bureau of Reclamation was not a public utility as defined by the Iowa statute was correct. Section 490A.1, Code of Iowa, 1966, in part, defines a "public utility" as including "any person, partnership, business, association, or corporation, domestic or foreign, owning or operating any facilities for:

1. Furnishing electricity to the public for compensation . . ."

The U. S. Bureau of Reclamation, of course, is not a "person, partnership, business, association, or corpora-

tion" so the Petitioner attempted to create and confer jurisdiction on the Commission by naming as respondents to the complaint filed with the Commission individual federal officials who were responsible for the operations of the Bureau. The attempted divorce of the individuals from the Bureau "is wholly lacking in substance" (Pet. p. A-10). *Larson, War Assets Administrator and Surplus Property Administrator* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. ed. 1628, (1949); *Dugan* v. *Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. ed. 2d 15, (1963). *Hawaii* v. *Gordon*, 373 U.S. 57, 83 S. Ct. 1052, 10 L. ed. 2d 191, (1963). Nor can the Petitioner successfully argue that the contemplated wholesale sales by the Bureau constitute furnishing electricity to the public for compensation within the meaning of the Iowa statute. See *Iowa State Commerce Commission* v. *Northern Natural Gas Company*, ... Iowa ..., 161 N.W. 2d 111 (1968).

2. The Commission was not acting in a vacuum as Petitioner implies in its reasons for granting the Writ. The complaint filed with the Commission was forwarded to the U. S. Respondents, they in turn commuicated with the Commission setting forth their position, and Petitioner replied. Contrary to Petitioners' assertions the issues were framed.

The U. S. Respondents in their correspondence pointed out that if the Bureau and its officers were held subject to Commission jurisdiction conflict with the provisions of Article VI of the Constitution of the United States would exist (Sup. R. p. 3). This conflict would inevitably result in a holding that the Iowa statute was unconstitutional. The existence of this conflict argues strongly against Commission jurisdiction

and further supports the Commission's disavowal of jurisdiction over the U. S. Government-Respondents since it must be presumed that the Iowa Legislature was aware of the conflict when it passed the statute defining public utilities and that it did not intend to indulge in a useless act.

3. Under the provisions of Section 490A.3, Code of Iowa, 1966, (Br. App. A. p. b) which sets forth the basic complaint procedure for public utility matters, the Commission-Respondents only have jurisdiction over complaints relating to the acts or omissions of public utilities and since the U. S. Government-Respondents are not a public utility, as has been shown, the complaint before the Commission could not, under any circumstances, have been maintained and it was properly dismissed.

4. The Commission found in the alternative that even if the U. S. Government-Respondents were a public utility under the Iowa statute that their acts complained of were exempt from regulation under the provisions of Section 490A.24, Code of Iowa, 1966 (R. p. 6) which Petitioner relied on in its complaint (R. p. 2).

Section 490A.24 (Pet. App. p. A-3) provides in part:

> "... Notwithstanding the foregoing provisions of this section, any public utility may extend electric service and transmission lines to another public utility for resale ..."

Petitioner conceded in its complaint to the Commission that the communities to which the U. S. Government-Respondents proposed to make the wholesale power sales were public utilities (R. pp. 2, 4-5). This being so the Commission acted properly when it made the finding and dismissed the complaint.

5. The Petitioner persists in the contention that the United States is not the primary party in this proceeding simply because it cannot succeed otherwise since it cannot show that the United States has consented to be sued. The Court of Appeals laid this ruse to rest when it noted "Here the direct effect of the relief sought by the Company would be to restrain the United States, through the Bureau of Reclamation of the Department of the Interior, from carrying out the congressional mandate of the Flood Control Act of 1944 to sell power generated at federal projects to municipalities and also to deprive the United States of the proceeds that could be obtained for the power, proceeds intended by congress to be applied to the cost of the projects". (Pet. App. p. A-11)

CONCLUSION

The Iowa Legislature did not, and indeed could not, authorize the Iowa State Commerce Commission to regulate the activities of the U. S. Government-Respondents.

The decision of the court below is correct. There is no conflict of decisions. No further review by this Court of the decision is, therefore, required. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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June 30, 1969

APPENDIX A

Constitutional Provisions

Article VI, U. S. Constitution

"... This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding ..."

Federal Statutes

43 U.S. C.A. 485h (c)

"Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any propect or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: Provided further, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies ..."

Flood Control Act of 1944, Section 9 (c) 58 Stat. at 891:

"...: The power developments to be undertaken by the Secretary of the Interior under (the plans approved for construction pursuant to the Act) * * * shall be governed by the Federal Reclamation Laws ..."

State Statute

Chapter 490A, Code of Iowa, 1966, 490A.3:.

"... Whenever there is filed with the commission by any person or body politic, or filed by the commission upon its own motion, a written complaint requesting the commission to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by any public utility subject to this chapter, in contravention of the provisions thereof, such written complaint thus made shall be forwarded by the commission to such utility, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the commission. If such public utility shall not satisfy the commission with respect to the complaint within the time specified and there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to promptly initiate a formal proceeding. Such a formal proceeding may be initiated at any time by the commission on its own motion ..."